

BRUNEI REPORTS

**Klasse Department Store Sdn Bhd v
Central Development Sdn Bhd**

COURT OF APPEAL (BANDAR SERI BEGAWAN) — CIVIL
APPEAL NO 4 OF 1989
TI LIANG YANG P, FUAD AND MAYO COMMISSIONERS
28 MAY 1990

Landlord and Tenant — Covenant to repair — Subsidence causing fissures and cracks in walls and leaking roof — Building rendered structurally unsound and needed underpinning of the foundations — Whether landlord obliged to carry out underpinning work — Whether covenant in lease extended to structural repair — Precise wording of covenant to be looked at

The defendant/respondent granted a lease of the building in question to the plaintiff/appellant for use as a department store. Some years later, when the plaintiff was considering the desirability and feasibility of refurbishing the entire building, it was discovered that there had been a differential settlement of the building, causing the internal expansion joint to open by about two to three inches. As a result of the subsidence, fissures and cracks appeared in the external walls and there was a measure of leaking from the roof. The plaintiff was advised to remove storage from the third floor level and subsequently, the plans for renewal were shelved and the plaintiff's business was closed.

The plaintiff claimed against the defendant on the repair covenant in the lease in which the defendant covenanted 'to keep the roof and the main drains and pipes and all external walls clean and in good repair including the repainting and redecorating of the same or any part thereof at such times and in such manner as the lessor in its absolute discretion may consider to be necessary'. During the trial, evidence was led that strengthening of the building's structure and underpinning of the foundations were needed if the building was to carry permitted loads on any of the floors. The plaintiff sought to impose such an obligation upon the defendant. However, at the conclusion of the trial, the court held that on the true construction of the covenant, the defendant was not obliged to carry out more extensive work which involved underpinning the demised premises.

The plaintiff appealed to the Court of Appeal, contending that the trial judge erred in law by holding that the obligation under the covenant undertaken by the defendant did not extend to structural repairs and that the repairing obligation would be sufficiently fulfilled by patching the fissures or cracks in the external walls notwithstanding his finding that there was no evidence that the external walls could be put right by such works.

The defendant cross-appealed, contending that the trial judge (i) erred in law in holding that the obligation undertaken by them under the covenant extended to repairing the roof; (ii) exercised his discretion wrongly when he ordered them to pay 80% of the plaintiff's costs, having found for them (the defendant) on the principal issue of liability and having disallowed almost all aspects of the plaintiff's claim for relief.

Held, dismissing the plaintiff's appeal and allowing the defendant's cross-appeal:

(1) The decision in each case must depend upon the language of the covenant which requires to be construed in the context

- A of the lease as a whole and against the matrix of facts in which the agreement was drawn up. The court is bound to keep the precise wording of the covenant firmly in mind.
- (2) The cases drew a distinction between repair and improvement and the general rule was that the defendant was not liable for any refurbishment of the building since this fell outside the lessor's duty to repair the roof and external walls. No claims could be allowed which were connected with the refurbishment of the premises for this would amount to an improvement and not a repair.
- B
- (3) The trial court was right to reject the plaintiff's contention that it would not be sufficient compliance with the covenant if the leaking roof and the fissures or cracks in the walls were put right by the defendant if the consequences would be that future settlement of the building would re-open the fissures in the external walls so that further remedial action would have to be undertaken to comply with the terms of the covenant.
- C
- (4) The work of underpinning and securing the foundations of the demised premises which, by their action, the plaintiff sought to impose upon the defendant, by the ordinary meaning of the words used in the covenant, the lease being read as a whole against the factual background and the relationship of the parties, went beyond the obligations it envisaged, and were so fundamental and extensive as to amount to improvement quite outside the contemplation of the parties. If the parties had contemplated that the defendant should be responsible for that type of work on the building, the covenant would have been quite differently worded.
- D
- (5) The evidence showed that the roof referred to in the expert evidence was not the original roof mentioned in the underlease. The roof was built by the plaintiff themselves over a third floor which had been added during the currency of the underlease in accordance with arrangements made between the plaintiff and the head landlord. The third floor with its new roofs was not the subject of the underlease with its repairing covenant. As such, the order made by the learned trial judge cannot stand in so far as it refers to any liability on the part of the defendant to keep the present roof (the new roof) in good repair.
- E
- (6) The power of an appellate court to interfere with the discretion exercised by the trial judge in awarding costs at the end of the hearing is severely limited and can only be justified on the application of well-known principles. However, in the court's opinion, the learned judge did not give sufficient weight to the fact that the plaintiff had failed in their attempt to impose the obligations they contended for upon the defendant, the extent of which became the central issue in the case. The order for costs cannot stand.
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- H

Cases referred to

- 1 *Post Office v Aquarius Properties* (1985) 276 EG 923 (refd)
- 2 *Brew Brothers Ltd v Snax (Ross)* [1970] 1 QB 612 (refd)
- 3 *Smedley v Chumley and Hawkes* (1982) 44 P&CR 50 (distd)
- 4 *Lurcott v Wakeley & Wheeler* [1911] 1 KB 905 (refd)
- 5 *Ravenseft Properties v Davstone (Holdings)* [1980] QB 12 (refd)
- 6 *Quick v Taff Ely Borough Council* [1986] QB 809 (refd)
- 7 *Lister v Lane & Nesham* [1983] 2 QB 212 (refd)
- 8 *Torrens v Walker* [1906] 2 Ch 166 (refd)
- 9 *Sotheby v Grundy* [1947] 2 All ER 761 (refd)
- 10 *Wates v Rowland* [1952] 2 QB 12 (refd)
- 11 *Elmcroft Developments Ltd v Tankersley-Sawyer* (1984) 270 EG 140 (refd)

RC Pryor QC (*David Menzies Young* with him) for the plaintiff/appellant.

PA Twigg QC (*Feridahnam (Mrs)* with him) for the defendant/respondent.

Cur Adv Vult

Fuad Commissioner: This is an appeal by the tenants from that part of the judgment of Sir Denys Roberts CJ dated 26 August 1989, whereby he construed and applied the landlord's repairing covenant in an underlease in the limited manner contended for by the covenantors, holding that on the true construction of the covenant, the landlords were not obliged to carry out certain more extensive work which involved underpinning the demised premises, an obligation the tenants sought to impose upon them.

The building in question was built in 1979 on land owned by a Mr Hapidz, then a director and shareholder of Central Development Sdn Bhd, the defendant company. He, together with three of his fellow shareholders were partners in the firm of architects which designed and supervised the construction of the building. At an early stage of the development it became the intention of Central Development to let the premises to the plaintiff (now the appellant), Klasse Department Store Sdn Bhd ('KDS') for use as a department store when it became ready for occupation.

At the time when the underlease became operative, Mr Hapidz himself held shares in KDS, as did Central Development, as well as a Singapore corporation controlled by two of Mr Hapidz's fellow shareholders in Central Development. Although shareholdings have since changed, the judge concluded that these cross holdings threw some light on the informal manner in which matters were dealt with between the parties to this action in its early stages.

Mr Hapidz was also a director of Abdul Razak Holdings which granted a head lease of the premises to Central Development. The head lease contained a full repairing covenant which bound Central Development.

It was common ground that although the draft of an underlease which had been prepared was never formally executed by the parties, Central Development let the premises to KDS upon the terms contained in the draft, with effect from 5 November 1979 for a period of ten years, with an option to renew the term for up to a further ten years. This option was exercised so that KDS became entitled to continue to occupy the premises until November 1999.

One of the covenants in the draft underlease which governed the relationship between the parties was that by which Central Development (cl 3(iii)) covenanted:

A To keep the roof and the main drains and pipes and all external walls clean and in good repair including the repainting and redecorating of the same or any part thereof at such times and in such manner as the lessor in its absolute discretion may consider to be necessary.

B Although as the pleadings developed, Central Development had to face a considerable number of claims and allegations, it eventually became clear that the claim put forward by KDS rested solely upon that clause. This is how the judge put it on p 48 of his judgment:

C It is only if there has been a breach by the lessor of this covenant that the relief claimed can be granted to the plaintiff. If no such liability of any kind rests upon the defendant, that is the end of the claim since it is conceded that no other covenant is appropriate to it.

D The evidence led before the judge showed that when, towards the end of 1986, KDS were considering the desirability and feasibility of refurbishing the entire building, it was discovered that there had been a differential settlement of the building, causing the internal expansion joint to open by about two to three inches. As an immediate measure, KDS were advised to reduce loading and immediately to remove storage from the third floor level and to review loadings on all the other floors. The plans for renewal were shelved and that floor was vacated. KDS were worried about the structural safety of the premises and closed the building on 10 February 1987 to enable experts to carry out further investigations.

E After a closure of about two weeks, business was resumed but at a reduced level. Rumours leaked out to the general public about the safety of the building and business dropped. A competitor, Yaohan, appeared on the scene and/or began business in premises close by. KDS were even more keen to refurbish their own premises so that they could compete with Yaohan.

G After KDS opened for business again, they operated until August 1988 when they held a closing sale and shut up shop. The premises have been empty ever since.

H A great deal of evidence was called about the state of the building. For the purposes of the issues raised by this appeal, in my view it is only necessary to record that the judge summarized his findings and conclusions on the matter in this way — I quote from pp 50 to 52 of his judgment:

- I
- (a) There was a building settlement at both ends of the KDS premises. This was an uneven settlement which consisted of at least 12 inches at the western end of the building and four inches at the other.
 - (b) This settlement has continued, in the form of creep which is continuing, in spite of the unloading of the building in September 1988, at the rate of about 1mm a month.
 - (c) The creep of the building is likely to continue for an unknown time.
 - (j) No attempt has been made by the lessor at any time to carry out any repairs on the premises.

- (m) The best method of making the premises safe for use as a store is the underpinning of the building.
- (n) It is likely that subsidence will continue, at least in the form of creep, for a considerable time and that the building can only be put right by underpinning of the kind which was suggested by Dr Lau.

I should mention here that Dr Lau was an expert whose report to KDS amplified by his evidence in court, suggested that strengthening of the structure and underpinning of the foundations was needed if the building was to carry permitted loads on any of the floors. This level of work, it was said, would cost something in the region of \$1m described by the judge as 'a very approximate upper figure'. On his way to reaching the conclusion I have read, the Chief Justice held that the addition of a third floor (with which Central Development was in no way concerned) had no significant effect on either the settlement or the creep: there was no evidence of overloading by KDS and nothing that they did contributed to the subsidence of the building. He also held that Central Development knew that substantial subsidence was taking place on the western end of the building, by the latest, on 16 February 1987.

It is not necessary to go any further into the expert evidence, except to say that as a result of the subsidence, fissures and cracks appeared in the external walls and there was a measure of leaking from the roof.

The hearing of the action took place before the Chief Justice over eight days in August 1989. In his reserved judgment, he referred at some length to the pleadings and then reviewed the expert reports and the evidence led by the parties in very considerable detail.

Having referred to the fact that KDS's claim rested solely on the cl 3(iii) covenant in the way I have set out above, the judge noted that he had not overlooked the general principles that in the absence of an express condition to the contrary, by letting premises the landlord made no warranty that the building was fit for any particular purpose or indeed for occupation at all; that no covenant could be implied that the lessor would carry out any repairs at all or that the building would endure for the remainder of the term; nor would the landlord be liable for any defects which would render the premises dangerous or unfit for occupation.

The judge then made the findings of fact which I have summarized above and went on to examine the covenant to repair. He observed that the cases drew a distinction between repair and improvement and that the general rule was that the defendant was not liable for any refurbishment of the building since this fell outside the lessor's duty to repair the roof and external walls. No claims could be allowed which were connected with the refurbishment of the premises for this would amount to an improvement and not a repair.

A The judge then referred to KDS's submission that it would not be a sufficient compliance with the covenant if the lessor were to put right the leaking roof at the fissures or cracks in the external walls, if the consequence of this would be that future settlement or creep would reopen the fissures in the external walls, necessitating further remedial action by the lessor under the covenant. He asked himself whether the obligation to keep the external walls in good repair could be said to require Central Development to carry out any other repairs to the structure which might make the building secure and ensure, so far as reasonably practicable, that no repairs would in future be required to the external walls.

B
C I am here referring to what the judge said at p 54 of his judgment. With great respect, I am not sure that I have fully understood how he answered the question he posed himself. What is clear, however, is that he held that when repairs which fell within the covenant were needed, they should be rectified within a reasonable time, which on the facts, Central Development had failed to do. They had 'made no attempt to fill in the various fissures or cracks which have been present in the external walls for a long time'. This, said the judge, would be relatively inexpensive compared with the heavy expenditure which would be involved if the obligation extended to underpinning the foundations, or to strengthening the building, which Dr Lau had considered necessary.

E
F The Chief Justice then said that the question arose whether the work required to put into order the serious defects that had been established fell within the scope of the covenant. It seemed to him that the ultimate test was whether the ordinary speaker of English would regard the word 'repair' as used in the covenant as appropriate to describe the work which had to be done — and he cited *Post Office v Aquarius Properties*.¹

G
H The judge continued by observing that if a building could only be saved by underpinning and by the insertion of improved foundations, that was usually an improvement and not merely a repair. Only if such work was essential to fulfil the covenant could it be said to fall within it. He approached the construction of the covenant in the way approved in *Brew Brothers Ltd v Snax (Ross)*,² stating that he was required to look at the building and its condition at the date of the lease and decide if, on a fair interpretation of the covenant, the requisite work could properly be deemed a 'repair'.

I The judge noted that nothing was said in the covenant about structural repairs and referred to the reliance placed by KDS on *Smedley v Chumley and Hawkes*.³ He distinguished that case, noting the difference between the wording of the covenant there and the one he had to construe. I shall have to return to the learned judge's reasoning, but his conclusion on the extent of Central

Development's liability under the covenant was expressed in this way:

I must therefore decide, so far as this part of the case is concerned, that there has been a breach by the landlord of its obligation to keep the roof and external walls in good repair, since approximately early 1987, but that no duty lies upon the landlord to undertake any structural repairs to the building, unless he can only deal with cracks which appear in the roof or the external walls by doing so. He is under no obligation to correct any movement, differential or otherwise, that may have occurred in the building.

KDS, by their memorandum of appeal, complain that the Chief Justice erred in law in holding that the obligation undertaken by Central Development by the covenant did not extend to structural repairs. Further, that he had erred in law in holding that the repairing obligation would be sufficiently fulfilled by patching the fissures or cracks in the external walls notwithstanding his finding that there was no evidence that the external walls could be put right by such works. It is said that in the light of his findings of fact, the judge should have held that the external walls and roof could not be put into proper repair in compliance with the covenant unless they were underpinned to prevent further settlement. KDS also complain about the order for costs made by the judge (that KDS should have 80% of their costs). They say that they should have been allowed the costs they incurred in preparing plans for the refurbishment of their store since those costs had been thrown away in consequence of the dilapidated state of the premises which made the refurbishment impossible.

Central Development cross-appeals, contending that the judge had erred in fact and in law in holding that the obligation undertaken by them under the covenant extended to repairing the roof. They also invite this court to vary the judge's order for costs.

Issues had been raised on this appeal regarding the proper quantum of damages. However, in the event we heard no submissions on these issues, having indicated to counsel, at the conclusion of argument on the true interpretation and effect of the covenant, that for reasons which we would give later (which we now do) KDS's appeal on the covenant issue had failed.

KDS's case is founded upon these propositions; that the proven state of the external walls (with their cracks and fissures) and of the roof (which leaks) clearly amount to disrepair within the meaning of the covenant and this had been conceded. The failure by Central Development to meet their obligations under the covenant had resulted in substantial loss to KDS. The continuing subsidence which affected the external walls could, as the evidence showed, only be remedied by underpinning, and unless and until this was done the walls would remain in a state of disrepair and Central Development would remain in breach of their obligations under the covenant.

Mr Pryor, for KDS, submitted that factual support for these propositions could be found particularly in paras (m) and (n) of the judge's findings at p 52 of his judgment (I have set these out above). He also relied upon the following passage which occurs at p 57:

I do not think that any evidence was given to the effect that repairs to the cracks which have appeared in the external walls could be put right by repairing them only, though Mr McGuckin agreed that if this were done, the losses suffered by KDS would have been less. On the contrary, it was said that the building was structurally unsound and could only be made safe by expensive underpinning. This may well be so.

I postpone, for the moment, a consideration of what in my respectful view, the judge meant by this passage except to observe that the passage must not be read in isolation.

Mr Pryor contends that the Chief Justice was wrong in law to construe Central Development's covenant as being limited to non-structural repairs, a conclusion which is summarized in this passage of the judgment at p 58:

As a matter of ordinary meaning, I find it impossible to say that a duty to repair the roof and external walls extends to structural repairs, in the absence of any other reference to structure in the lease.

If this is correct, as I think it is, the landlord's duty to repair is a limited one and he is under no obligation to make the premises structurally sound but only to ensure that the roof and external walls remain in good condition.

He points to *Lurcott v Wakeley & Wheeler*³ as an example of a situation where a covenant to keep premises in repair, without any limitation and without any reference to structural works, was held to require the rebuilding of an entire wall which necessarily involved structural elements.

That case is no doubt a valuable one in the line of authorities cited to us, but it need hardly be said that the decision in each case must depend upon the language of the covenant which requires to be construed in the context of the lease as a whole, and against the matrix of facts in which the agreement was drawn up (which will include such matters as the relationship between the parties, the state of the building etc). In *Lurcott*,³ the covenant was a wide one and could fairly be described as a full repairing covenant. The lessee covenanted that he would 'from time to time during the said term ... well and substantially repair, paint, glaze, cleanse and keep in thorough repair and good condition all the said premises ... and (they) being so repaired and kept would at the end ... of the term ... yield (them) up ...'. Shortly before the expiry of the term, the London County Council served notice on the owners and occupiers requiring them to take down the front external wall of the 200-year old house as being a dangerous structure. The lessee, when called upon to do so by the landlord, declined to comply with the notice. Owing to the state of the wall and the decay due to old age, it could not be repaired without rebuilding. The

Court of Appeal upheld the decision of the Divisional Court that the lessee was properly held liable for the costs of taking down and rebuilding the dangerous wall.

It seems to me that when obtaining as much assistance as we can from the authorities cited to us, we must guard against the danger of extracting a principle from a decision which depends (questions of the proper approach of a court to the task of construing a repairing covenant apart) upon the way a particular covenant is framed. In my judgment, therefore, we are bound to keep the precise wording of the covenant which we have to construe firmly in mind and this is clearly what the learned Chief Justice did.

Speaking for myself, I do not obtain much assistance from *Lurcott*³ in attempting to resolve the issues between the parties here. However, *Brew Bros Ltd v Snax (Ross)*² is particularly valuable for, before holding (by a majority) that the necessary works did not fall within the scope of the repairing covenant, the Court of Appeal suggested the correct approach for the court to adopt in deciding such a question, which was the approach adopted by the judge. I will cite short passages from the judgment of Sachs LJ. At p 640 he said:

It seems to me that the correct approach is to look at the particular building, to look at the state which it is in *at the date of the lease*, to look at the precise terms of the lease, and then come to a conclusion as to whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair. However large the covenant, it must not be looked at in vacuo.

Quite clearly this approach involves in every instance a question of degree ...

He added at p 641:

I also agreed with the view of Phillimore LJ that the court must look at the work required as a whole and not seek to look at component parts of that work on the doomed premises individually.

An example of the adoption of this approach is the decision of Forbes J in *Ravenseft Properties v Davstone (Holdings)*.⁵ Another example where the same approach was followed was *Smedley v Chumley and Hawkes*,³ the authority most heavily relied upon by Mr Pryor. There premises were let for use as a restaurant for 21 years from 1972. There was a tenant's repairing covenant, while the landlord covenanted '[To] keep the main walls and roof in good structural repair and condition throughout the term and to promptly make good all defects due to faulty materials or workmanship in the construction of the premises'. By 1976, defects were found — some of the floors sloped: some windows and doors were out of true: there was a differential movement of two walls where they joined and there were cracks in the floor.

The tenant's surveyor who had found these defects, advised immediate action to arrest the subsidence which

A had caused the defects. Superficial repairs had been inadequate. The tenant's insurers (as happened to KDS) withdrew their public liability policy and the restaurant had to be closed. The landlords themselves carried out the structural work necessary to put the building into good structural condition. This involved jacking up the building and the concrete raft on which it had been built. It had been the tilting of the raft which had caused consequential damage to the structure of the walls and the roof. More piles had to be driven in to support the raft; the raft had to be lowered on the new joists and a new floor had to be laid down. The superstructure then became the same as it had been when the building was first erected, but the foundations were different.

Cumming-Bruce LJ, who gave the leading judgment in the Court of Appeal upholding the decision of the trial judge, discussed the nature of the obligations respectively undertaken by the landlord and by the tenant and said that there was ample evidence to support the judge's finding that 'the only way to put the walls and roof into a safe structural condition was to carry out such major works to the foundations as were necessary to give walls a stable base'.

E Cumming-Bruce LJ referred to a number of authorities that support the general principle 'that where a tenant is liable to keep in repair he is not liable to do work that has the effect of giving the landlord a different and better house than was let', and observed that the obligations undertaken where an old house is let might differ from those undertaken where the lease of premises recently constructed were involved, adding that it was 'necessary to examine carefully the whole lease and to decide the intention to be collected therefrom'. He was of the opinion that the landlords' covenant placed upon them 'an unqualified obligation to keep the walls and roof in good structural condition'.

H After referring to the landlords' contention that the test whether the effect of the works was to render the premises something different from the premises let was to be applied by comparing the state of the premises at the date of the lease with their state after the work had been done, the Lord Justice concluded his judgment (with which Templeman LJ, as he then was, and Dame Elizabeth Lane agreed) as follows:

I I prefer to compare the premises contemplated by the parties at the date of the lease with the premises as changed by the works actually done. Here the landlords built a complex of chalets with a restaurant for the use of the public including the persons occupying the chalets. Having built the restaurant they let it to the tenant on terms that the tenant would run it as a restaurant for the use of their licensees. The landlords accepted the obligation to keep the structure of the walls of the restaurant in good structural condition. When the work was done, they returned the restaurant to the tenant in the state it was in at the date of the lease. The only difference

was that the structure of walls and roof were stable and safe upon foundations made structurally stable.

I would distinguish the facts in the instant case from the facts in *Brew Brothers Ltd v Snax (Ross)* [1970] 1 QB 612. I compare and contrast the extent of the obligations imposed by the covenant to keep in repair in the context of the lease and of the circumstances in that case with the extent of the obligation, with its emphasis upon structure, in covenant 3(b). That emphasis upon structure is significant, because the structural condition of walls and roof is likely to depend on their foundations. So here I would hold that after the works were done the difference to the premises was that the walls and roof were in the condition that both parties contemplated as their necessary condition at the date of the lease.

I have already mentioned that the trial judge distinguished *Smedley*.³ He first pointed out that the covenant in our case was more limited in its terms. He said that in the *Smedley*³ case there was an unqualified duty imposed on the lessor to keep the walls and roof 'in good structural condition' — nothing in the cases suggested that a covenantor could be relieved of this burden if, in order to fulfil it, he had to rebuild the premises. In his view, the Court of Appeal had laid emphasis upon 'structure' which was regarded as significant because the structural condition of the walls and roof was likely to depend on their foundations.

Mr Pryor submits, however, that the reference to structure by the Court of Appeal did not alter the proper approach in principle. It was not right, he suggested, to consider that a covenant to keep the roof and all external walls in good repair as being more limited in its embrace than a covenant to keep them in good 'structural condition'. If it were shown, he argued, that a wall was not in good structural condition, the wall could not be said to be in good repair.

For my part, I think the judge was justified in distinguishing *Smedley*.³ It seems to me that an obligation 'to keep and maintain the main walls and roof in good structural repair and condition throughout the term and to promptly make good all defects due to faulty materials or workmanship in the construction of the premises' must, as a matter of language, be much wider than an obligation 'to keep the roof and ... all external walls in good repair'. I respectfully agree with Cumming-Bruce LJ that considerable significance must be attached to the emphasis in the *Smedley*³ covenant on structure since the structural stability of walls will necessarily depend upon the soundness of their foundations. I interpolate here my understanding that where the Chief Justice refers to structural repairs in his judgment (between pp 55-59) he is addressing the structural repairs which KDS suggests should be the responsibility of Central Development.

However, in my judgment, there is a more important distinction between the facts in *Smedley*³ and the facts in

A our case, a point upon which Mr Twigg (who did not appear in the court below) places great reliance. Apart from the need to address the following preliminary questions: (a) to what parts of the building does the covenant refer and what was the nature of the obligation undertaken and (b) were any of the parts covered by the covenant out of repair (questions which need not detain us for the answers are clear from the plain wording of the covenant and the judge's findings of fact) it is Mr Twigg's contention that KDS's whole case must rest upon the proposition that the only practicable way of repairing the walls and roof was to underpin the foundations.

C Mr Twigg relies upon the following passage from the judgment of the Chief Justice (p 59) for his contention that the works proposed by KDS involving extensive underpinning, were found by the judge not to be the only practicable way of repairing the cracks and fissures in the walls:

D I conclude that the plaintiff has established that Cen Dev was wrong, in failing to fulfil its covenant to repair for an unreasonable time after knowing of its breach, but that it has not shown that such repairs can only be carried out by an extensive underpinning of the building.

E I find that it is possible for the landlord to fulfil the covenant to keep the external walls in good repair by such maintenance works as are necessary to close any fissures and cracks which have appeared in them. I do not consider that he is under any duty to make the building safe, unless this is the only way of discharging his obligation under the covenant, and there is no evidence of this.

F Although the finding of fact relied upon by Mr Twigg (against which there is no appeal) is clearly enough stated here, I have to say, and with great respect, that I have not found it easy to understand what the judge meant by the passage at p 57 to which Mr Pryor points, and which I have set out above (it begins 'I do not think ...' and ends 'This may be so.'). I venture to think that the judge meant to emphasize that there was no evidence that the fundamental defects in the structure could be put right by merely repairing the cracks in the walls. I say this because immediately following that passage on p 57, the judge says: 'But I must remember that there is nothing at common law ... to prevent a landlord from letting premises in a state of structural disrepair ...'. Be that as it may, I am satisfied that nothing in that rather confusing passage can affect the essential finding of fact on p 59.

G There is ample authority for the proposition put forward by Mr Twigg regarding the first hurdle which KDS has to surmount: I do not consider it necessary to review the facts in *Quick v Taff Ely Borough Council*.⁶ There, at p 818, Dillon LJ suggests that the basis for the decision in *Ravenseft*⁵ was the following proposition:

I If there is such damage caused by an unsuspected inherent defect, then it may be necessary to cure the defect, and thus to some extent improve without wholly renewing the pro-

perty as the only practicable way of making good the damage to the subject matter of the repairing covenant.

Dillon CJ's judgment contains a useful review of a number of other authorities. Among them is *Smedley*³ about which he says, inter alia, 'the damage to a recently constructed restaurant built on a concrete raft on piles over a river could only be cured by putting in further piles ...'.

In the same case, at p 822 Lawton LJ discusses a number of authorities and after referring to *Ravenseft*⁵ and expressing the opinion that Forbes J's approach had been right ('In that case the repair work could not be done satisfactorily without getting ride of the design fault'), he went on to say:

It follows that, on the evidence in this case, the trial judge should first have identified the parts of the exterior and structure of the house which were out of repair and then have gone on to decide whether, in order to remedy the defects, it was reasonably necessary to replace the concrete lintels over the windows, which caused 'cold bridging,' and the single glazed metal windows, both of which were among the causes, probably the major causes, of excessive condensation in the house.

About counsel's submission that repairing the wooden frames and the plaster could only be done sensibly if the windows and lintels were replaced by ones of better design, and the reliance he placed upon *Ravenseft*,⁵ Lawton LJ said, on p 823: 'He seems to have overlooked the important fact (in that case) that the cladding around the building was in disrepair and could only be repaired in a sensible way, if the design fault were put right.' On the same page Neill J said:

The authorities to which we were referred establish that, in some cases, the only realistic way of effecting the relevant repairs is to carry out some additional work which will go somewhat further than putting the property back into its former condition and will indeed result in some improvement. But this case does not fall into that category.

In my view this must be the right approach, and the onus clearly lay on KDS on this issue. I would also say that I think the Chief Justice was right to reject the contention made of behalf of KDS that it would not be a sufficient compliance with the covenant if the leaking roof, and the fissures or cracks in the walls, were put right by Central Development (or at their expense) if the consequence would be that future settlement of the building would reopen the fissures in the external walls so that further remedial action would have to be undertaken to comply with the terms of the covenant (pp 53-54 of the judgment.)

It seems to me to be a matter of degree and that a common sense approach to this aspect of the matter is needed. If the work which Central Development is now prepared to pay for can properly be described as 'repairs' within the meaning of the covenant, then the obligation it contains will be fulfilled. If there had been evidence that

merely patching up the walls would have been pointless or futile because almost as soon as it had been done, the defects in the walls would have reappeared, then it could not be said that patching the walls was a practical or sensible way of meeting the obligations in the covenant. But there was no such evidence, as the judge found.

If the views I have sought to express are right, they are sufficient to dispose of the central issue in this appeal. However, we heard argument on the question whether the proposed work of underpinning the foundations constituted 'repair' upon the true construction of the covenant. Mr Twigg seeks to uphold the judge's conclusion that Central Development could only be liable under the covenants for repairs and not for any improvement (p 52) and that if a building could only be saved by the operation of underpinning and by the insertion of improved foundations, this was usually an improvement and not merely a repair (p 55).

The question will, of course, turn on the wording of the covenant which falls to be construed. In *Lister v Lane & Nesham*,⁷ a house at least 100 years old was let to a tenant who covenanted 'when and where and as often as occasion shall require, well, sufficiently, and substantially, (to) repair, uphold, maintain amend and keep' the premises (and to yield them up at the end of the term 'so well and substantially repaired ... and kept'). At pp 216-217, Lord Esher MR said:

Those cases seem to me to shew that, if a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing, and, moreover, the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair.

The same approach was adopted in *Torrens v Walker*⁸ which was a case involving an even older house. Many of the authorities concern obligations under tenants' repairing covenants but, as might readily appear, it is the wording of the covenant which effectually governs the position and not whether the covenantor is a tenant or is a landlord. As Warrington J points out on p 174:

Both those cases were decided on the liability of the lessee in respect of a lessee's covenant, and it is contended that they do not apply to a covenant by the lessor. But, in my judgment, there is no difference in principle. If the lessee is not bound to give back to the lessor at the end of the term a different thing from that which was demised to him, neither, in my judgment, is the lessor bound, by a similar covenant, to give to the lessee during the term a different thing from which the lessee took from him at the beginning of his tenancy.

In *Sotheby v Grundy*,⁹ which was applied in *Ravenseft*,⁵ in interpreting and applying a lessee's covenant 'to repair uphold support maintain' the premises 'with all necessary reparations and amendments whatsoever', Lynskey J distinguished *Lister v Lane*,⁷ emphasizing that the proper ambit of a repairing covenant must be a question of degree in each particular case. At p 762, the judge had this to say:

I am told here by the two witnesses whose evidence I accept that the only way in which what happened could have been prevented would have been by underpinning. It is suggested that if 15 years ago, when bulging was noticed, the tenant had underpinned, he would have been able to prevent further deterioration taking place. I am told that that would have meant shoring up the premises, the removal of the existing foundations such as they were, stage by stage, and the putting in of a new foundation in the way of footings and concrete to make the building safe. That, in my view, would, in effect, be asking the tenant to give the landlord something different in kind from that which had been demised. The premises demised here were premises with insecure foundations. What the tenant would have had to do would be to put in a new foundation which would alter the nature and extent of the property demised, turning a building which, as originally constructed, would not last more than some 80 odd years into a building that would last for probably another 100 years.

In my view, that does not come within the purview of the repairing covenant in question here. If the landlord desired to obtain such rights, he ought to have made it clear in the lease, so that the tenant would know that he was undertaking an obligation, not merely to repair, maintain and support the existing building demised, but also to make good original defects in the premises as erected.

*Wates v Rowland*¹⁰ is a helpful example, for the Court of Appeal, after stressing that each case must turn very much on its own facts, had to decide whether certain work that had been done fell within the ambit of the expression 'improvement or structural alteration' or of the word 'repairs' in the relevant statute. I think that the nature of the work done, and the approach of the Court of Appeal, sufficiently appears from the following passage from the judgment of Jenkins LJ at pp 20-21:

Turning again to the facts of the present case in their relation to the relevant statutory provisions, there is no doubt that the landlord has incurred expenditure, and I think he has certainly incurred expenditure on a structural alteration, that is to say, the addition of the further nine inches of concrete. He has also incurred expenditure on what is *prima facie*, according to the ordinary meaning of the word, an 'improvement', for on the evidence he has made the house, as regards its substratum, and the system of construction of the floor and its foundations, very much better than they ever were before.

Is there, then, any sufficient reason for holding that this expenditure is to be excluded from consideration on the ground that it was expenditure on repairs? In my judgment the answer to that question is; up to a point this work, the totality of the work done, was work of repair. The tenant had a floor in the house when he went in, and clearly the house could not be said to be in good tenantable repair after the floor had become rotten. The replacement of a floor of some

A kind would, I think, therefore fairly come within the description of 'repairs'. It would be making good a defect arising from the action of the water underneath the floor which had caused the floor to rot, and to that extent, therefore, the expenditure in my view could not properly rank for the 8 per cent increase, and it is not contended that it should so rank.

B But the landlord did substantially more, in my view, than merely provide a new floor. He did make a structural alteration and an improvement, consisting of the laying of the additional concrete bed over the existing concrete, and that provided the house with a better substratum than it had before, in the shape of a solid concrete bed on to which the new floor could be laid direct, thus getting rid of the disadvantage under which the house had laboured from the time it was built, consisting of the cavity beneath the floor, into which, under the changed conditions brought about by the rise in water level, water could find its way.

C The last authority I will briefly discuss is *Elmcroft Developments Ltd v Tankersley-Sawyer*.¹¹ There is, if I may say so, a valuable review of the leading authorities by D Ackner LJ, as he then was, in a case where the relevant covenant obliged the landlords to 'maintain and keep the exterior of the building and the roof, the main walls, timbers and drains thereof in good and tenantable repair and condition'. The Court of Appeal upheld the decision of the county court which held the landlords liable on that E covenant to cure penetrating damp in a flat built in Victorian times in a high-class area of London by inserting a proper damp-course by silicone injection, the original construction of a layer of slates, intended to perform the same function having proved, over the course of time, ineffectual. I will merely quote one passage from the F judgment of Ackner LJ (at p 142). For he deals, *inter alia*, with matters which have been argued before us:

G I therefore conclude that the learned judge was wholly right in the decision which he made as to the failure by the appellants to comply with the repairing covenant and their obligation in regard to curing the damp by using the only practical method at this price, namely, injecting silicone into the wall. Mr Whitaker was at one stage prepared to concede that, as the plaster became saturated (which of course, it was), his clients had the obligation to do the necessary patching — that is removing — the perished plaster and renewing it. I am bound to say that concession made the resistance to inserting the damp-proof course a strange one. The damp-proof course, once inserted, would on the expert cure the damp. The patching work would have to go on and on and on, because, as the plaster absorbed (as it would) the rising damp, it would have to be renewed, and the cost to the appellants in constantly being involved with this sort of work, one would have thought, would have outweighed easily the cost in doing the job properly. I have no hesitation in rejecting the submission that the appellants' obligation was repetitively to carry out I futile work instead of doing the job properly once and for all.

With the assistance of the able arguments addressed to us, on the authorities cited, I have reached the conclusion that the work of underpinning and securing the foundations of the demised premises which, by their action, KDS sought to impose upon Central Development, by the ordinary

meaning of the words used in the covenant, the lease being read as a whole against the factual background and the relationship of the parties, went beyond the obligations it envisaged, and were so fundamental and extensive as to amount to improvement quite outside the contemplation of the parties. In my judgment, if the parties had contemplated that Central Development should, if the eventuality arose, be responsible for that type of work on the building, the covenant would have been quite differently worded. For one thing, one would have expected some reference in the covenant to the building itself, a reference which (unlike the position in many of the cases cited to us) was conspicuously absent.

By their cross-appeal, Central Development say that the Chief Justice was wrong in holding that the obligation they had undertaken in the covenant extended to repairing the roof. The evidence showed that the roof referred to in the expert evidence was not the original roof mentioned in the underlease. It appears that the roof was built by KDS themselves over a third floor which had been added during the currency of the underlease in accordance with arrangements made between KDS and the head landlord. The third floor with its new roof was not the subject of the underlease with its repairing covenant. Moreover, no evidence was called to show that the original roof was defective or that the problems connected with the roof were caused by, or related to, the settlement of the building. In my judgment, the order made by the learned Chief Justice cannot stand in so far as it refers to any liability on the part of Central Development to keep the present roof (the new roof) in good repair.

Also by their cross-appeal Central Development contend that the judge exercised his discretion wrongly when he ordered them to pay 80% of KDS's costs, having found for Central Development on the principal issue of liability and having disallowed almost all aspects of KDS's claim for relief.

This is what the learned Chief Justice said on the subject of costs:

The plaintiff succeeded in part, in establishing that there had been a breach of covenant by the defendant, though it did not establish that under the covenant the defendant was obliged to repair the structure of the building, so as to make it sound, but only to maintain the roof and external walls in a good state of repair.

Much of the evidence was concerned with matters which were not admitted in the pleadings, where the plaintiff was said to have caused such damage as may have occurred by reason of his overloading.

While I appreciated that the defendant wished to contest some of these matters, in case I were to have found that a wider liability lay on the defendant to make the building safe for the purposes for which it was let, I nevertheless am satisfied that much of the time of the trial and of the preparatory work was absorbed in matters which could have been

answered, without any admission of liability, by the defendant, in answer to the Notice to Admit which was served on it on 13 April 1989 over 3 1/2 months before the action began.

In particular, I remind myself of the discretion which resides in the court as to costs, one which has to be exercised judicially, and decide that the justice of this case would be properly met if I were to order the defendant to pay 80% of the plaintiff's costs of the action, such costs to be taxed if not agreed.

Central Development accept, of course, that the judge had a wide discretion but say that the only real issue on liability was whether or not they were obliged to underpin the foundations, an issue upon which they succeeded. They had, they say, never been called upon to patch up the walls etc to the extent to which they were found responsible. It was, they suggest, unrealistic to have expected them to admit some of the facts they had been called upon to admit which were largely matters of opinion and matters which were the subject of expert evidence. They say that the other matters in the notice to admit would not, had admissions been made, have saved any costs.

The power of an appellate court to interfere with the discretion exercised by the trial judge in awarding costs at the end of the hearing is severely limited and can only be justified on the application of well-known principles which do not need re-stating.

However, with very great respect, in my opinion the learned judge did not give sufficient weight to the fact that KDS had failed in their attempt to impose the obligations they contended for upon Central Development, the extent of which became the central issue in the case. It must, I think, be a matter for conjecture what course the preparation and hearing of the action which have taken if the demands of KDS had been limited to meeting the far less onerous obligations the judge found they had undertaken. It may be, who knows, that there would have been no action at all. I do not think that the order for costs can stand. I would set it aside and order that there be no order as to costs of the action (and counterclaim).

I would therefore dismiss KDS's appeal and allow Central Development's cross-appeal in relation to repairing the proof and in respect of the costs of the action, to the extent I have indicated.

Ti Liang Yang P: For the reasons given by my brother Fuad, I, too, would dismiss the appeal. I would also allow the cross-appeal to the extent indicated.

I Mayo Commissioner: I also agree with what has been said and have nothing to add.

Order accordingly.

Solicitors: Bonds; DF Abang Zen.

Reported by Ng Sheau Jiu